

management of timber resources on the White Mountain reservation preempted the ability of the state to impose a tax on a non-Indian contractor who cut timber from the Tribe's land. In that case, the Supreme Court held that preemption does not require express congressional statements that states may not regulate in an area. Instead, the Court found that the state jurisdiction will be preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, or if it conflicts with a comprehensive regulatory scheme that the United States Government has established.

"It is the position of the Chemehuevi Indian Tribe that the county tax will be preempted if there is a body of federal law that already governs the area of Indian leases in a comprehensive manner, taking into account the state tribal and federal interests involved.

"The leasing of Indian lands is covered in Chapter 12 of Title 25 of the United State Code. Specifically, Section 415(a) authorizes leases of Indian lands, where tribally or individually owned. The lands were may be leased by the Indian owners with the approval of the Secretary of the Interior. 25 U.S.C. Section 415(a). Section 415 limits the period of most leases, and it also provides several factors which must be considered by the Secretary prior to the approval of any lease or extension of any existing lease. Id. Regulations have been promulgated under Section 415, providing for rules on negotiation of leases, subleases and assignments and lease provisions, among other things. 25 C.F.R. Section 162 (1987)."

White Mountain Apache Tribe v. Bracker, supra, copy enclosed, is factually distinguishable in various respects, among them:

1. It pertains to the State of Arizona's motor carrier license tax and to its use fuel tax.
2. It pertains to the imposition of those taxes on a logging company operating solely on an Indian reservation.

3. The logging company used state, Bureau of Indian Affairs, and tribal roads in its operations.

4. The logging company contested imposition of the taxes upon its logging activities on Bureau of Indian Affairs and tribal roads, but not state roads (p.670, f.6).

5. The Supreme Court was called upon to consider the scope of federal law/regulation of Indian timber vis-a-vis those taxes.

Addressing the circumstances in which those taxes were imposed, the Supreme Court put forth applicable tests to be used to determine whether the taxes could stand:

"Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art 1, § 8, cl 3. (Citation omitted.) This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. (Citations omitted.) Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them'. (Citations omitted.) The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' ..., against which vague or ambiguous federal enactments must always be measured." (p. 672)

It then concluded that these taxes were preempted by federal law, federal regulation of harvesting of Indian timber being so pervasive as to preclude those burdens and the state's interest in raising revenue being insufficient to permit its intrusion

into the federal regulatory scheme with respect to the harvesting and sale of timber:

"In these circumstances, we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their motor vehicle license and use fuel taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation. There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation."
(pp. 675, 676)

Cases, including the case of White Mountain Apache Tribe v. Bracker, supra, in which federal preemption has been found have been distinguished from other cases by the courts, including the 9th Circuit Court of Appeals in Chemehuevi Indian Tribe v. California State Board of Equalization (1986) 800 F.2d 1446, copy also enclosed. In that case, the Court of Appeals also dismissed the Chemehuevi Tribe's contention that state cigarette tax on cigarette sales to non-Indians on the reservation impermissibly interfered with the Tribe's ability to govern itself. Note that the Tribe's attorney in Chemehuevi Indian Tribe v. California State Board of Equalization, supra, was Mr. Marston.

The Agua Caliente Band of Mission Indians v. Riverside County, supra, and The Fort Mojave Tribe v. San Bernardino County, supra, are, as you know, possessory interest cases directly applicable to the situations you pose. In the former, the 9th Circuit Court of Appeals held that possessory interest taxes could be imposed on lessees of Indian lands, absent legislation demonstrating a congressional purpose to forbid them. And in the latter, the same Court of Appeals held that possessory interest taxes could be imposed on non-Indian lessees of lands held in trust by the United States government for the Tribe, that state legislation primarily directed to non-Indian lessees of Indian lands not be considered as automatically preempted by the Federal government in absence of specific authorization, and that such possessory

interest taxes on such non-Indian lessees were not invalid as being an interference with the Tribe's right of self-government:

"...Although McClanahan, *supra*, held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with 'exertions of state sovereignty over non-Indians who undertake activity on Indian reservations.' (Citation omitted.) When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. (Citation omitted.) Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. (Citations omitted.) To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. This does not contravene the maxim that ambiguous statutes should be construed to benefit Indians. The maxim was never intended to authorize constructions which, on their face, benefit non-Indians handsomely and Indians only marginally, if at all." (p. 1257)

* * *

"The interference with Indian self-government in the instant case is much less serious. No Indian or Indian land is being subjected to direct state court process. The only effect of the tax on the Indians will be the indirect only of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe." (p. 1258)

Thus, the Court of Appeals considered both the question of whether imposition of possessory interest taxes upon non-Indian lessees was preempted by federal law and the question of whether such imposition infringed upon the Tribe's right of self-government, and imposition of possessory interest taxes was not precluded for either reason.

Thereafter, review of these decisions by the United States Supreme Court was sought in both instances, but certiorari was denied (The Agua Caliente Band of Mission Indians v. Riverside County (1972) 405 U.S. 933; The Fort Mojave Tribe v. San Bernardino County (1977) 430 U.S. 983), in effect, allowing the decisions to stand. Shepardization of the decisions disclosed that neither has been overruled and hence, that they remain in effect as of this date.

To the same effect is the earlier state court decision in Palm Springs Spa, Inc. v. Riverside County (1971) 18 Cal.App.3d 372, copy also enclosed.

In addition to White Mountain Apache Tribe v. Bracker, *supra*, the Tribe relies upon Segundo v. City of Rancho Mirage (1987) 813 F.2d 1387, copy also enclosed, wherein the 9th Circuit Court of Appeals held that application of local rent control ordinances to a mobile park operated by a non-Indian entity on Indian land was preempted by federal law. In the court of its decision, the court did state:

"...the regulatory scheme surrounding leasing of Indian lands leaves 'no room' for application of the ordinances at issue."
(p. 1393)

But it stated also on that same page:

"...Unlike the field of taxation, where the laws of both the State and Tribe may be enforced simultaneously, the cities' rent control ordinances would necessarily preclude enforcement of a conflicting ordinance enacted by the Tribe, and would 'effectively nullify' the Tribe's authority to regulate the use of its lands." (p. 1393)

And despite referring to The Agua Caliente Band of Mission Indians v. Riverside County, *supra*, on page 1389 and to The Fort Mojave Tribe v. San Bernardino County, *supra*, on page 1390 for various propositions, the Court did nothing to even intimate that

the decisions thereon, that possessory interest taxes could be imposed on non-Indian lessees of Indian lands, were no longer correct, should be questioned or overruled, etc.

With respect to the "Indian leasing statutory scheme", the United States Code has contained provisions pertaining to leasing of Indian lands for many years, well prior to the decisions in The Agua Caliente Band of Mission Indians v. Riverside County, supra, The Fort Mojave Tribe v. San Bernardino County, supra, and Palm Springs Spa, Inc. v. Riverside County, supra. In the former case, the Court of Appeals did not refer to 25 U.S.C.A. §§ 400 et seq. and it distinguished a possessory interest tax imposed upon the use of property from a tax imposed upon the property itself. In the following case, the Court of Appeals analyzed "the applicable federal statutes to determine whether state action has been preempted", although no reference was made to federal statutes pertaining to leases of property in this regard (25 U.S.C.A. §§ 400 et seq), and the Court concluded that it had not. The Court was aware of those provisions, however, as it referred to 25 U.S.C.A. § 415, as well as to Palm Springs Spa, Inc. v. Riverside County, supra, later in its decision. And in the latter case, the Court found no preemption with respect to the regulation of commercial transactions vis-a-vis possessory interest taxes on leasehold interests of non-Indians in Indian lands (25 U.S.C.A. §§ 261-264).

Accordingly, unless and until the Tribe or anyone else pursues legal action and obtains an appellate level decision to the effect that leases of Chemehuevi Tribe Lands to non-Indians are preempted by federal law and/or infringe upon the Tribe's right of self-government, in our opinion, Article XIII, Section 1 of the California Constitution, Revenue and Taxation Code Sections 201, 104, and 107, and The Agua Caliente Band of Mission Indians v. Riverside County, supra, and The Fort Mojave Tribe v. San Bernardino County, supra, continue to require the assessment of possessory interests to non-Indian lessees of the Tribe's lands.

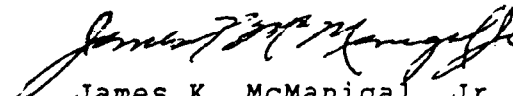
Finally in this regard, enclosed for your information are copies of our April 14, 1981, letter to Riverside County and March 14, 1985, letter to Kings County regarding possessory interests in Indian lands, and referencing The Agua Caliente Band of Mission Indians v. Riverside County, supra, and The Fort Mojave Tribe v. San Bernardino County, supra; and a copy of our Letter to Assessors No. 91/71, Hoopa Valley Tribe v. Nevins (1989) 881 F.2d 657, with decision, also a 9th Circuit Court of Appeals decision. Note that in the latter, imposition of California's timber yield tax against purchasers of Hoopa Valley Tribal timber was held to be preempted by federal law, along the lines of the

May 8, 1992

rationale of White Mountain Apache Tribe v. Bracker, supra, among other cases; and that neither The Agua Caliente Band of Mission Indians v. Riverside County, supra, nor The Fort Mojave Tribe v. San Bernardino County, supra, were mentioned in the decision, presumably, because considerations relevant to taxes pertaining to harvesting of Indian timber have been viewed by the court as separate and distinct from considerations relevant to assessments of possessory interests to non-Indian lessees of Indian lands.

With respect to your ability to obtain information regarding such leases/possessory interests, inasmuch as leases are involved, information should be available from individual lessees, not just the Tribe. And enclosed in this regard is a copy of the 1978 Opinion of the Attorney General No. CV 78-67, 61 OAG 524, Assessment of Land Against Will of Owner. Question and Answer 1 set forth the several statutory rights of discovery available to assessors when appraising and assessing properties of uncooperative owners.

Very truly yours,


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Enclosures

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